IN THE UNITED STATES DISTRICT COURT~

FOR THE DISTRICT OF ARIZONA

DALE K. HARRIS, et al., Plaintiff, V. UNITED STATES OF AMERICA, et al., Defendant.	NO. CIV 95-0481-PHX-PGR Filed March 28,1997 JUDGEMENT

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_XX__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the court having granted defendant's motion to dismiss that plaintiff take nothing and the complaint and action are hereby dismissed in its entirety pursuant to FRIVP 12(b)(6).

DATED at Phoenix, Arizona, this 28th day of March 1997.

RICHARD H. WEARE
Clerk of Court/DCE

By: /s/ B. Walker
Deputy Clerk

CIV-21(7/94)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DALE K. HARRIS, et al.,	)	No. CIV 95-481 PHX PGR
	)	Filed Jan 19, 1996
Plaintiffs,	)	
	)	**ORDER**
vs.	)	
	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

The plaintiffs originally filed this action *in propria persona* in the Eastern District of Oklahoma, complaining of events arising during their employment as contract status teachers at a B.I.A. boarding school on the Navajo reservation. The Oklahoma district court transferred the action to this district, over the plaintiffs' protests, pursuant to 28 U.S.C. § 1404(a). Among the motions pending before the Court is the plaintiffs' request to have this action transferred back to the Oklahoma district court. Having considered the parties' memoranda, the Court finds that the motion should be denied. The general rule is that a transferee court should not re-transfer a case except under the most impelling and unusual circumstances or when the original transfer order is discrimination. Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995); Arnold v. United States, 816 F.2d 1306 (9th Cir. 1987); Otto v. Heckler, 781 F.2d 754 (9th Cir.), *amended by* 802 F.2d 337 (9th Cir. 1986). The Court presumes from the plaintiffs' various memoranda, such as their Brief in Support of Jury Trial and Answers to Defendants['] Points and Authorities, filed June 20, 1995, and their Respon[se] to Defendants['] Motion for Summary Judgment, filed May 24, 1995, that the only claims that they are still attempting to allege are in reality some type of constitutional tort claim pursuant to Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388, 91 S.Ct.1999 (1971), against the individual defendants in their individual capacities based upon viola-

tions of the Fifth Amendment due process clause.[1]

The Court is not now deciding the issues of whether the plaintiffs have the right to even bring a Bivens action for any alleged due process violations or other federal constitutional torts related to their employment as B.I.A. contract teachers, see e.g., Berry v. Hollander, 925 F.2d 311 (9th Cir. 1991); Volk v. Hobson, 866 F.2d 1398 (Fed.Cir.), cert. denied, 490 U.S. 1092 (1989), or, if they can, whether their amended complaint states any kind of a claim for a constitutional tort falling outside of Title VII's preemptive purview. The Court does not consider such issues to be before it at this time given the lack of appropriate briefing.

Since the Court is perplexed as to exactly what claims the plaintiffs are attempting to allege, the Court will require them to file a second amended complaint that sets forth their constitutional tort claims in detail sufficient to apprise the defendants and the Court of the legal and factual bases of those claims. The plaintiffs are advised that this will be in all likelihood their last chance to file an amended complaint and that this action will be subject to dismissal without leave to amend if the second amended complaint fails to state a proper claim. The plaintiffs are further advised that under Fed.R.Civ.p. 11(b) they have the obligation to undertake a reasonable pre-filing inquiry to ensure that all claims alleged in the second amended complaint have a legal and factual basis. The second amended complaint must consist of one document, must comply with Fed.R.Civ.P. 8(a) and 10 and Local Rule 1.9, must not incorporate by reference any portion of any prior pleading, must allege separate claims in separate counts, must distinguish among the defendants if not all claims pertain to all defendants, and must distinguish between the plaintiffs if not all claims pertain to both plaintiffs.[2] The plaintiffs are also advised that it is their obligation to be familiar with, and abide by, this Court's published Local Rules. Therefore,

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[1] Although the plaintiffs repeatedly refer to 42 U.S.C. § 1983 and the Fourteenth Amendment as the bases for their "civil rights" claims, the proper bases, if any, are Bivens and the Fifth Amendment since there are only federal actors in this action. Daly-Murphy v. Winston, 837 F.2d 348, 355-56 (9th Cir. 1987).

[2] The plaintiffs are advised that the Harris children are not plaintiffs in this action and that the plaintiffs, given their *pro se* status, may not prosecute any claims on the behalf of the children. See e.g., Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876, 882-83 (3rd Cir. 1991).

IT IS ORDERED the defendants' Motion to Dismiss Improper Parties Defendant (doc. #144) is denied.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (doc. #148) is granted in part to the extent that all of the plaintiffs' claims cognizable under Title VII pertaining to employment discrimination and reprisal are dismissed.

IT IS FURTHER ORDERED that the plaintiffs' Motion to Transfer Case to Oklahoma (doc. #152) is denied.

IT IS FURTHER ORDERED that the plaintiffs' Motion to Extend Time for Respond [sic] for Motions (doc. #141) is denied without prejudice to the plaintiffs being able to seek an extension of time to respond or reply to individual motions pursuant to Local Rule 1.10(n) if the response and reply times mandated by Local Rule 1.10(c) (d), or (l)(2) do not provide them with sufficient time.

IT IS FURTHER ORDERED that the plaintiffs' Request Respond to Motions (doc. #174) is granted to the extent that the above motions are herein ruled upon.

IT IS FURTHER ORDERED that the plaintiffs' Amended Complaint (together with all additions thereto) is *sua sponte* dismissed and that the plaintiffs shall file a second amended complaint in conformance with this order no later than March 6, 1996. The plaintiffs' failure to timely comply with this order shall result in the dismissal of this action without further notice. Dated this 18th day of January, 1996.

/s/ PAUL G. ROSENBLATT
Paul G. Rosenblatt
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

DALE K. HARRIS & MARY M. VAN Plaintiff vs. UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, BRUCE BABBITT, Secretary, CHARLES JOHNSON MICHAEL SCHOENFELD, DUKE STEPHENSON, CATHY BEGAY, WILLIAM MEHOJAR, DONALD NECONIE, Defendants	Case No. CIV-94-349-B Filed March 9, 1995

ORDER TRANSFERRING VENUE

This matter comes before the Court on the Motion to Transfer Venue filed October 31, 1994 by the Defendants herein (Docket Entry #19) with Brief in Support thereof (Docket Entry #20) and Plaintiffs' Response to the Motion to Transfer filed November 8, 1994 (Docket Entry #25) with Brief in Support thereof (Docket Entry #26).

After review of the above-referenced pleadings and consideration of the applicable law, this Court hereby finds that the Defendants challenge the venue of the Eastern District of Oklahoma on the basis of convenience. In this action, Plaintiffs allege that in 1992, while employed as teachers at the Greasewood Boarding School located on Navajo indian land in Arizona, they and their children were subjected to harassment, threats on their lives, sexual molestation, and ultimately, termination in their employment, all in violation of their civil rights. Accordingly, Plaintiffs seek damages for these wrongs which allegedly

took place on a compound located on indian land, over which the federal goverment and the various Defendants exercised governmental authority. In support of the Motion to Transfer Venue, the Defendants state that:

1. All of the incidents for which the Plaintiffs seek redress occurred in Arizona;

2. Greasewood Boarding School which employed the Plaintiffs as teachers is located in Arizona;

3. All investigations of the alleged incidents occurred in Arizona and thus the reports of the investigations are located in Arizona;

4. Plaintiffs pursued a Federal Tort Claim against the federal government. The files and all of the investigations surrounding these tort claims are located in Arizona;

5. At all relevant times, the Plaintiffs and the Plaintiffs' children were residents of Arizona;

6. The alleged molestations of the Plaintiffs' children occurred between August 1, 1992 and September 8, 1992 in Arizona:

7. The perpetrators of the alleged abuse are residents of the state of Arizona;

8. The records of the EEO Complaints previously filed by the Plaintiffs on their termination from employment with Greasewood Boarding School are located in Arizona;

9. The police reports and investigators of all of the incidents allegedly giving rise to Plaintiffs' cause of action are located in Arizona; and

10. All of the fact witnesses, including employees and administrators at the Greasewood Boarding School are residents of Arizona or places other than Oklahoma.

Accordingly, the Defendants request that this action be transferred to the District of Arizona since most, if not all of the fact witnesses and documentation are located in that district.

For their part, Plaintiffs respond to the request to change venue, that they and their children are now residents of the State of Oklahoma and to require them to travel to Arizona to prosecute this action would cause great hardship and inconvenience for them. Further, the Plaintiffs identify certain counselors and medical witnesses who presumably have treated Plaintiffs and/or Plaintiffs' children for the alleged abuses against them. Finally, Plaintiffs assert that a great number of the documents and witnesses necessary to present their case are located in Washington, D.C. Therefore, the Eastern District of Oklahoma is no less convenient than the District of Arizona. Therefore, the action should remain pending in the Eastern District of Oklahoma in the interest of fairness and convenience.

Initially, the Defendants do not challenge that venue is improper or that this Court lacks personal jurisdiction over them pursuant to 28 U.S.C. § 1391(c). Thus, the sole basis for transfer of venue alleged in the Motion is 28 U.S.C. § 1404(a). Typically, a plaintiff is given wide latitude in choosing a particular forum "for commencing an action.[2] However, venue may be changed, for the convenience of parties and witnesses in the interest of justice." 28 U.S.C. § 1404(a). The defendant requesting a transfer of venue has the burden of proving that a particular case should be transferred. Bussey v. Safeway Stores, Inc., 437 F.Supp 41, 43 (E.D.Okla. 1977). This burden is met by establishing that venue in another forum will be more convenient to the parties and witnesses while serving the interests of justice. Id. at p. 43.

The overwhelming mass of documentation and investigations have occurred where the alleged incidents against the Plaintiffs and their children occurred - Arizona. The sole basis for keeping this action in the Eastern

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[1]However, by virtue of their Motion to Dismiss filed October 31, 1994, and the Addendum thereto filed November 1, 1994, Defendants allege that the Plaintiffs failed to comply with Federal Rule of Civil Procedure, Rule 8 in setting forth a short and plain statement of the basis for this Court's jurisdiction.

[2] Texas Gulf Sulfer Company v. Ritter 371 F.2d 145, 147 (10th Cir. 1967); Headrick v. Atchison, T.& S.F.Ry., 182 F.2d 305, 310 (10th Cir. 1950); Chrysler Credit Corporation v. Country Chrysler, Inc. 928 F.2d 1509, 1515 (10th Cir. 1991).

District of Oklahoma is that the Plaintiffs and their children and some of their subsequent medical witnesses are currently residents of this district. However, this is a relatively recent relocation to this district by the Plaintiffs and their children. During all times relevant to the events alleged in this action, the Plaintiffs and their children were residents of the State of Arizona. Without doubt, the convenience of the witnesses and the interest of justice are more appropriately served by transferring this action to the District of Arizona. This fact is bore out by the Plaintiffs' attempt to take all depositions by telephone, due to the particular witnesses being located outside of the Eastern District of Oklahoma, many of whom are located in Arizona and also by Plaintiffs' attempt to use depositions previously taken of these witnesses. Clearly, the majority of these witnesses are outside the subpoena power of this Court and could not be compelled to provide testimony herein. Accordingly, this Court finds that the convenience of the parties and the interest of justice require this Court to grant the Motion to Transfer Venue to the District of Arizona where this action may be more appropriately pursued.

This Court recognizes the pendency of various motions concerning the introduction of evidence at trial and ultimate disposition of this case. However, it would be inappropriate for this Court to impose its rulings on these matters when another court will ultimately conduct the trial of this case. Accordingly, this Court will defer ruling on these matters to the transferree court in Arizona.

IT IS THEREFORE ORDERED THAT the Motion to Transfer Venue filed October 31, 1994 by the Defendants herein (Docket Entry #19) is hereby **GRANTED**. Accordingly, the Clerk of this Court shall **TRANSFER** this action upon entry of this Order to the United States District Court for the District of Arizona, Phoenix Division.

IT IS SO ORDERED this 9th day of March, 1995.

/s/ MICHAEL BURRAGE
Michael Burrage
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DALE K. HARRIS and MARY VAN,	)	CA. No. 97-15660
	)	D.Ct. No. CIV 95-00481-PHX-PGR
Plaintiff-Appellants,	)	
v.	)	
UNITED STATES OF AMERICA, et, al.,	)	**MOTION FOR PERMISSION TO LATE FILE APPELLEES' BRIEF**
Defendants-Appellants.	)	

For the reasons set forth in the attached Affidavit of Assistant U.S. Attorney John R. Mayfield, the defendants-appellees, pursuant to Circuit Rule 31-2.4, move this Court for an Order permitting the late filing of the response brief which was due on August 27, 1997.

Respectfully submitted this 29th day of August, 1997.

JANET NAPOLITANO
United States Attorney
District of Arizona

/s/ John R. Mayfield
JOHN R. MAYFIELD
Assistant U.S. Attorney
4000 United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (602) 514-7500

Attorneys for Appellee

STATE OF ARIZONA)
) §.
COUNTY OF MARICOPA)

John R. Mayfield, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney with primary responsibility for handling the appeal in the above-captioned case;

2. That the brief of the United States was due to be filed on August 27, 1997;

3. That because of a recent move of the Civil Division from the federal court house over the weekend of August 23rd and 24th, 1997 critical delays occurred in the final review of the draft response brief. Additionally, computer system start-up problems and malfunctioning photocopying equipment added to the difficultly in obtaining a final draft and preparation of the brief and supplemental excerpts of record. Every effort was made to complete and serve the response brief on August 27, 1997. However, by 6:30 p.m. it was discovered that numerous errors had occurred in the text of the brief and case citations that had not appeared in earlier drafts. Due to the lateness of the hour it was not possible to obtain a telephonic extension. On the morning of August 28, 1997, he placed a call to the Office of the Clerk requesting a telephonic extension. As the due date had passed a telephonic extension could not be granted as a matter of course and that a formal motion would be required;

4. That no previous extension of time has been requested by the United States;

5. That the plaintiffs - appellants Dale K. Harris and Mary Van are appearing pro se in this litigation;

6. That he avows that he has exercised diligence in attempting to complete the brief, that the extension is not being sought for the purposes of delay, and that the brief is being filed along with this motion;

7. That he spoke by telephone on the morning of August 28, 1997

to Ms. Van, pro se, explained the situation and advised her of the need of the defendants to request a late filing of the response brief. She indicted that she would not oppose the request for late filing of the response brief. Further, he advised her that the response brief would be filed and served as soon as possible.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 29th day of August, 1997.

/s/ JOHN R. MAYFIELD
John R. Mayfield
Assistant U.S. Attorney

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

DALE K. HARRIS and MARY M. VAN, Plaintiffs, V. UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR, Bruce Babbitt, Secretary: CHARLES JOHNSON; MICHAEL SCHOENFELD; DUKE STEPHENSON; CATHY BEGAY; WILLIAM MEHOJAH; and DONALD NECONIE, Defendants.	)	Case No. CIV-94-349-B Filed March 9, 1995

This matter comes before the Court on the Motion to Dismiss Torts Claim and for Case to Proceed as a Civil Rights Case filed by the Plaintiffs on December 5, 1994 (Docket Entry #46) with Brief in Support thereof (Docket Entry #47) and Defendant's Response thereto filed December 12, 1994 (Docket Entry #67).

At the commencement of this case, some question existed as to whether the Plaintiffs were pursuing a civil rights or a tort claims action. By virtue of the Motion, Plaintiffs now request that the action go forward on the allegations of violations of their civil rights and dismiss the tort claim. Although reserving the right to pursue dismissal of the civil rights claim, Defendant does not object to the requested dismissal. Accordingly, the Motion shall be granted.

IT IS THEREFORE ORDERED THAT Plaintiffs' Motion to Dismiss Torts Claim and for Case to Proceed as a Civil Rights Case filed December 5, 1994 (Docket Entry #46) is hereby **GRANTED**.

IT IS SO ORDERED THIS 9th day of March, 1995.

/s/ MICHAEL BURRAGE
Michael Burrage
UNITED STATES DISTRICT JUDGE

APPENDIX I

BUREAU OF INDIAN AFFAIRS 44 BIAM ADDITION TO FPM
PERSONNEL MANAGEMENT

CHAPTER 335 Promotion and Internal Placement 44 BIAM 335 2.1

SUBCHAPTER 2. Reassignment of Non-Indians

.1 Purpose. This subchapter sets forth the Bureau's policy with respect to the reassignment of employees not entitled to Indian preference.

.2 Policy. It is the policy of the Bureau under the provisions of Public Law 96-135 that individuals of the Bureau of Indian Affairs who are not entitled to Indian preference may be reassigned where such reassignment is necessary due to one of the following reasons:

A. To assure the health or safety of the employee or any member of the employee's household;

B. In the course of reduction in force;

C. Because the employee's working relationship with a tribe has so deteriorated that the employee cannot provide effective service for such tribe or the Federal Government.

.3 Procedures for Documentation of Individual Cases.

A. To assure the health or safety of the employee or any member of the employee's household, the Administrative Official in charge must submit the following:

(1) For health cases:

(a) A narrative description of the health problem including any and all reasons for the health problem of which be/she is aware.

(b) A written medical report based upon a recent (90 days) physical examination by a licensed physician, which describes in detail the health problem and the probable cause, if it is known. including a

request filed by the employee or any member of the employee's household. The doctor should be asked to identify conditions necessary to alleviate health problems.

(c) A description of the interim actions which the official is taking to limit or alleviate the health problems.

(2) For safety cases:

(a) Narrative description of the safety problem.

(b) A statement by the Area Special Officer or Area Safety Officer of his/her assessment of the threat and his/her ability to provide adequate security for the employee.

(c) A recommendation on the ultimate issue of whether the assignment of the employee is proper and promotes the efficiency of the service.

(d) A statement by the employee that he/she is aware of the proposed action and that he/she may submit a written statement which will be considered before a final decision is rendered.

B. All reduction in force requests to reassign non-Indians will be sent to the Assistant Secretary - Indian Affairs, ATTN: Chief Personnel Officer. The name, series, grade and level of performance of each employee will be provided.

C. If the employee's working relationship with a tribe has so deteriorated through no willful act by the employee that he/she cannot provide effective service for such tribe, the Agency Administration Official must provide documentation which contains:

(1) A statement with specificity and detail which explains how the deterioration occurred.

(2) A written statement that the employee has been notified of the actions taken. The employee must be given a reasonable time of not less than ten days to submit a written response.

(3) A statement of the efforts such official has made to informally resolve the matter.

(4) A recommendation as to the ultimate issue of whether a reassignment is proper and promotes the efficiency of the service.

.4 Approving Authority. The Secretary, Under Secretary or the Assistant Secretary - Indian Affairs are authorized to grant approval for reassignments. Requests to make reassignments will be directed to the Chief Personnel Officer.

(1) A request to reassign an employee should be submitted in advance to allow at least 45 days for processing the approval.

(2) Upon receipt of approval, the requesting office will be notified by telephone of the approval. A written confirmation of the approval will follow.